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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TAMEKA INGRID WRIGHT, Appellant.	)	2 CA-CR 2009-0080 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20073648

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

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Tucson
Attorney for Appellant

K E L L Y, Judge.

¶1 After a jury trial, appellant Tameka Wright was convicted of transportation of marijuana for sale and possession of drug paraphernalia. In this appeal, she argues the trial court abused its discretion by denying her request for a limiting instruction, denying

her motion to disclose the identity of a confidential informant, and beginning trial in her absence. She also argues her convictions should be reversed due to prosecutorial misconduct. Finding no error, we affirm.

Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Wright's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In September 2007, Arizona Department of Public Safety officers and Pima County Sheriff's deputies were conducting surveillance on a house that Wright was renting because they suspected it was a "stash house" maintained for the purpose of conducting drug-related activities.

¶3 A surveillance officer saw a vehicle pull into the home's garage and depart again less than an hour later. Officers followed the vehicle and initiated a traffic stop after the driver failed to signal a lane change. Wright was the passenger in the vehicle. When the officer conducted a license check, he discovered the driver had a suspended license and attempted to arrest him. The driver ran from the officer, but was eventually apprehended. After a drug-detecting dog alerted on the vehicle, officers found approximately 135 pounds of marijuana in the vehicle.

¶4 Officers subsequently obtained a warrant and searched Wright's house. Inside they found "Space Bags" and other wrapping materials; shipping boxes; ledgers and notes containing addresses, dollar amounts and tracking numbers; and a shipping scale with bits of marijuana on it. There was no furniture in the living or dining room. The state charged Wright with transportation of marijuana for sale and possession of drug

paraphernalia. After a jury trial, which Wright failed to attend on the first day, she was convicted of all charges. The trial court sentenced her to a presumptive, five-year term of imprisonment on the transportation-for-sale count and time served on the paraphernalia count. This appeal followed.

Discussion

Other acts evidence

¶5 Wright first alleges the trial court abused its discretion by refusing to a give a limiting instruction based on Rule 404(b), Ariz. R. Evid. She asserts that evidence relating to the use of her home as a "stash house" was evidence of "packaging and shipping operations, separate and apart from the evidence and acts for which [she] was charged." We review the trial court's rulings on jury instructions for an abuse of discretion. *See State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995) ("The decision to refuse a jury instruction is within the trial court's discretion, and this court will not reverse it absent a clear abuse of that discretion.").

¶6 During trial, Wright requested that the court instruct the jury, pursuant to Rule 404(b), to limit its consideration of evidence that she "may have been involved in a packing and shipping operation separate and apart from what she's charged with" and that it disregard such evidence completely if the state failed to "prove it by clear and convincing evidence." On the last day of trial, Wright proposed a limiting instruction consistent with this request. She argued that evidence about a packing and shipping operation in her rental home could lead the jury to "see her as a pot dealer who is more likely . . . to be involved in the transportation of the [marijuana] that was found in the

back of the [vehicle]." The state maintained, as it does on appeal, that the evidence supported a finding of guilt on the paraphernalia charge against Wright. The court rejected the instruction.

¶7 First we note that Wright has not cited this court to any specific evidence presented at trial that constituted "other act" evidence. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). She points to portions of the prosecutor's arguments that she maintains "painted a picture of marijuana operations . . . [that] had no relevance to the instant offense" and were "merely extrinsic evidence which was designed to inflame the jury against [her]." As the jury was instructed, however, arguments of counsel are not evidence. *State v. Robinson*, 127 Ariz. 324, 329, 620 P.2d 703, 708 (App. 1980). And, prosecutors are allowed to draw inferences from the evidence presented at trial in making their arguments. *See State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 24, 42 P.3d 1177, 1184 (App. 2002).

¶8 To the extent Wright intended to address officers' testimony about marijuana transportation and "stash house" operations, we agree with the state that "the evidence at issue was not 'other acts' evidence." *See* Ariz. R. Evid. 404(b) ("[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). The testimony was not about any other acts that Wright had committed, but rather was about the officers' experiences with how marijuana is transported and stored and what "stash houses" look like and contain. As the jury was instructed, and as the instruction Wright proposed also stated, the state was required to prove she had used the items found in her rental home for drugs. Testimony

about how those items are used in "stash houses," and about the similarity of Wright's rental home to such houses, was circumstantial evidence that Wright was using the items in the house for drugs and, therefore, of Wright's guilt on the charge of possession of drug paraphernalia.[1]

¶9 Wright also maintains on appeal that the evidence should have been excluded. But her argument below appeared to be a request for a limiting instruction, not preclusion of the evidence, so that arguably she has forfeited the right to seek relief for all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Even assuming, however, that her argument below implicitly included a request to preclude at least some of the evidence, the reasoning above supports the trial court's exercise of its discretion to admit the evidence. *See State v. Boggs*, 218 Ariz. 325, 334, ¶ 38, 185 P.3d 111, 120 (2008) ("We review a trial court's evidentiary rulings for abuse of discretion.").

¶10 Additionally, in a confusing argument, Wright contends "the State used conspiracy evidence as a means of proving accomplice liability." She apparently maintains that certain testimony given by an officer and the prosecutor's arguments allowed "the State [to] use[] conspiracy evidence as a means of proving accomplice liability." But, we are not persuaded that anything in Wright's trial caused her to be

[1]In her reply brief, Wright argues our supreme court's ruling in *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998), supports her argument. In *Lee*, the court ruled that drug-courier-profile evidence could not be used as evidence of guilt. *Id.* ¶ 12. But, arguments raised for the first time in a reply brief are waived. *State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005). Moreover, Wright has not cited any authority extending this rule to the instant context. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi).

found guilty of crimes in which she was not either an accomplice or a principal. *See Evanchyk v. Stewart*, 202 Ariz. 476, ¶ 15, 47 P.3d 1114, 1118 (2002). Thus, although Wright is correct that Arizona has rejected the doctrine set forth in *Pinkerton v. United States*, 328 U.S. 640 (1946), we do not agree that the *Pinkerton* doctrine was applied here. *See Evanchyk*, 202 Ariz. 476, ¶ 15, 47 P.3d at 1118 (*Pinkerton* doctrine "holds a conspirator guilty for foreseeable crimes committed by his coconspirator in furthering the conspiracy even though he did not intend or agree on those crimes.").

Disclosure of confidential informant's identity

¶11 Wright also contends the trial court abused its discretion by denying her motion to disclose the identity of the state's confidential informant. We review the trial court's ruling on a motion to compel disclosure of an informant's identity for an abuse of discretion. *See State v. Tuell*, 112 Ariz. 340, 342-43, 541 P.2d 1142, 1144-45 (1975).

¶12 Generally the state may withhold the identity of confidential informants. Ariz. R. Crim. P. 15.4(b)(2); *see also State v. Superior Court*, 147 Ariz. 615, 616, 712 P.2d 462, 463 (App. 1985). However, if "disclosure of the name is necessary or desirable to show the defendant's innocence or . . . nondisclosure would deprive [the] defendant of a fair trial then the privilege must give way." *State v. Benge*, 110 Ariz. 473, 477, 520 P.2d 843, 847 (1974). The defendant bears the burden of demonstrating the informant is likely to have evidence bearing on the merits of the case and that nondisclosure of the informant's identity would deprive the defendant of a fair trial. *State ex rel. Berger v. Superior Court*, 106 Ariz. 470, 474, 478 P.2d 94, 98 (1970); *State v. Castro*, 13 Ariz.

App. 240, 242, 475 P.2d 725, 727 (1970); *State v. Robles*, 182 Ariz. 268, 271, 895 P.2d 1031, 1034 (App. 1995).

¶13 In this case, Wright moved to reveal the identity of any confidential informant or "source of confidential information." She argued that certain information in the investigating officers' reports had suggested they received information from a confidential informant. She maintained that the reports had made it "evident that the individual . . . [had] personally observed the placing [of] the [marijuana] in the vehicle" and that his or her "own role . . . is open to serious question." Therefore, she contended, it was "important for the defense to interview the individual . . . as to how he knew that marijuana would be in the [vehicle] . . . [and] what he [or she] stood to gain by supplying police with information in this case."

¶14 Wright argues *Roviaro v. United States*, 353 U.S. 53 (1957) "is dispositive in this case." But, in *Roviaro*, the informant "had been present with the accused at the occurrence of the alleged crime, and might [have been] a material witness as to whether the accused knowingly transported the drugs as charged." 353 U.S. at 55. In this case, however, at the hearing on the motion, codefendant's counsel merely argued his client and Wright "belie[ved] . . . [t]he person who supplied the information put the marijuana in the vehicle." Wright did not produce any evidence to support this speculative allegation about the alleged informant's role in the matter. *See State v. Grounds*, 128 Ariz. 14, 15, 623 P.2d 803, 804 (1981) (each side must present evidence supporting its allegations regarding disclosure of informant identity; argument of counsel not evidence); *State ex rel. Berger v. Superior Court*, 21 Ariz. App. 170, 172, 517 P.2d 523, 525 (1974)

("A mere possibility or speculative hope that an informant might have other information which might be helpful to the defendant is insufficient" to compel disclosure.). There were no stipulated facts suggesting an informant might be a material witness and Wright did not testify at the hearing or present any affidavit, deposition testimony or other evidence in support of the motion. *See Grounds*, 128 Ariz. at 15, 623 P.2d at 804. Indeed, Wright failed to argue how the confidential informant's testimony would have aided her defense or that the informant was a percipient witness. Thus, Wright has not sustained her burden of proving she was denied a fair trial by the trial court's denial of her motion and we cannot say the trial court abused its discretion in so ruling. *See id.*[2]

Prosecutorial misconduct

¶15 Wright next argues the prosecutor committed misconduct by leading witnesses, asking improper questions, disparaging defense counsel and defense witnesses, and vouching for the state's witnesses. Of the eighteen questions and arguments cited by Wright on appeal, only three were objected to below. But, the objections were not made on the grounds of prosecutorial misconduct. Wright objected without stating a basis when the prosecutor asked an officer, "So you're putting your life on the line based on the accuracy of the information . . . gained through . . . informants?" The court sustained the objection and the question was stricken. The prosecutor next asked if the officer had "found the information through the . . . many informants that have provided you with

[2]To the extent Wright suggests the state violated the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), or that her right to confront her accusers as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004), was violated, the arguments are waived for failure to adequately develop them on appeal. *See State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005).

information to be accurate." Wright objected on the ground of hearsay and the objection was overruled. Finally, when the prosecutor mentioned that Wright shared the master bedroom in the rental home with her codefendant, she objected, again without stating a basis. The objection was sustained and the comment stricken.

¶16 Because Wright did not object on the grounds of prosecutorial misconduct to these statements, *see State v. Rutledge*, 205 Ariz. 7, ¶ 30, 66 P.3d 50, 56 (2003), or to the remaining instances of misconduct she alleges on appeal, we review only for fundamental error, *see Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. "In determining whether a prosecutor's improper statement[s] constitute[] fundamental error, we examine, under the circumstances, whether the jurors were probably influenced and whether the statement[s] probably denied Defendant a fair trial." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993). But here, with the exception of an unsupported statement that "the use of leading questions created fundamental error,"[3] Wright has failed to argue the purported misconduct was fundamental error. Although we will not ignore fundamental error if it is apparent, *see State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007), the failure to argue on appeal that error was fundamental generally waives such a review, *see State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶17 In any event, based on the record before us, "we do not believe that the statement[s] tipped the scales of justice and denied [Wright] a fair trial." *Bible*, 175 Ariz.

[3]Wright does not specify to which leading questions she is referring. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi).

at 601, 858 P.2d at 1204. The trial court struck one of the prosecutor's questions and his comment in closing rebuttal argument to which Wright had objected. The trial court also instructed the jury that arguments of counsel are not evidence and that, "When an objection to a lawyer's question [is] sustained you are to disregard the question and you're not to guess what the answer to the question might have been." We presume jurors follow the instructions they are given. *State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007). Therefore, even if the prosecutor's question or comment constituted error, the jury instruction negated or mitigated any deleterious effect. *See State v. Morris*, 215 Ariz. 324, ¶ 55, 160 P.3d 203, 216 (2007) ("Even if the prosecutor's comments were improper, the judge's instructions negated their effect."); *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) ("[T]he superior court instructed the jury that anything said in closing arguments was not evidence. We presume that the jurors followed the court's instructions.").

¶18 Additionally, most of the statements to which Wright now objects were made by the prosecutor during opening statement or closing argument. Prosecutors have considerable latitude in making their arguments. *See State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000); *State v. Burruell*, 98 Ariz. 37, 40, 401 P.2d 733, 736 (1965). Here, the prosecutor did not vouch for his witnesses. *See State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989) ("Two forms of impermissible prosecutorial vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony."). And, although "we are concerned with some of the

phrasing of the prosecutor's [statements] which seem to impugn the integrity of defense counsel and suggest to the jury that defense counsel is being deceitful," *State v. Denny*, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1978), we cannot say they rose to the level of fundamental error.

Trial begun in Wright's absence

¶19 Finally, Wright maintains the trial court wrongfully determined she had voluntarily absented herself from the first day of the trial. On the first day, September 3, 2008, when Wright was not present, the court inquired about her whereabouts. Her counsel stated he did not know and that he had not had contact with her in about a month. He stated he was uncertain whether she had been told of the trial date, but conceded she had been warned that trial would go forward in her absence. The court concluded her absence was voluntary and proceeded with the trial.

¶20 Wright appeared on the second day of trial and the state argued she should be remanded to custody. In arguing she should not be remanded, her counsel told the court Wright had left town and had been "confused as to the start of trial." The court questioned Wright about what she had known about the trial date and she stated she had "checked on-line" to see how her case was proceeding and although she had been unable to find her own case, she had found information about her codefendant's case in the database and had seen a trial date of September 22. She stated she had then called her attorney to tell him she was coming to Tucson and wanted to meet with him, but he had been out of the office so she left a message. She then called back on September 3 and someone in her counsel's office told her the trial had begun.

¶21 The prosecutor, however, told the court Wright's counsel had "been responsive to phone calls in two cases [he] [had] with him" and had attended interviews during the previous week. Wright's counsel stated that Wright had called two weeks before and left a number, but when he called the number he reached someone else. The state maintained a trial date of September 22 had never been set, and Wright's counsel said that although the date had been considered, he did not know if it had ever been "posted on that date." Wright's counsel did not object to the trial proceeding in her absence on the first day and did not request a mistrial upon her return on the second day. We therefore review for fundamental error.[4] *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶22 "The Sixth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, and article II, § 24, of the Arizona Constitution, establish and protect a defendant's right to be present at his [or her] trial. However, '[a] defendant may voluntarily relinquish the right to attend trial.'" *State v. Reed*, 196 Ariz. 37, ¶ 3, 992 P.2d 1132, 1133 (App. 1999), *quoting State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 9, 953 P.2d 536, 539 (1998).

¶23 Under Rule 9.1, Ariz. R. Crim. P., "[t]he court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence

[4]Wright has failed to argue fundamental error occurred when the trial proceeded in her absence. Such a failure generally constitutes a waiver of the argument and we could, therefore, decline to address it. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140. But, like Wright, the state has also failed to assert this issue is subject only to fundamental error review.

should he or she fail to appear." *See also State v. Armenta*, 112 Ariz. 352, 353, 541 P.2d 1154, 1155 (1975). And, "[w]hen the record demonstrates that such notice has been provided, the trial court may presume the absence is voluntary and the burden is on the defendant to demonstrate otherwise." *State v. Fristoe*, 135 Ariz. 25, 34, 658 P.2d 825, 834 (App. 1982).

¶24 Wright was personally notified in April 2008 of her then-current trial date and that the trial would go forward in her absence. Even accepting Wright's assertion on appeal that "[t]he record was unclear as to what type of notice she had of the [ultimate] trial date," her "failure to know of the continued dates of [her] trial . . . is directly attributable to [her] failure to keep in contact with the court and [her] attorney." *Brewer v. Raines*, 670 F.2d 117, 119 (9th Cir. 1982) ("A defendant cannot be allowed to keep h[er]self deliberately ignorant and then complain about h[er] lack of knowledge."). As noted above, Wright had left Tucson and had not spoken to counsel for a month at the time of trial. Indeed, the trial court set the September 3 trial date on June 25, giving Wright more than two months to learn of the current date. "'[I]t was [Wright's] duty under the conditions of h[er] release to maintain contact with the court and/or h[er] attorney as to the trial date and any changes in that date.'" *State v. Tudgay*, 128 Ariz. 1, 3, 623 P.2d 360, 362 (1981), *quoting State v. Rice*, 116 Ariz. 182, 186, 568 P.2d 1080, 1084 (1977). In sum, no error, much less fundamental error, occurred. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608 ("To obtain relief under the fundamental error standard of review, [a defendant] must first prove error.").

Disposition

¶25 Wright's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge